

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSH L. ANDERSON,)	
)	
Plaintiff)	
)	
v.)	
)	Civil Action No. 04-135 Erie
LARRY E. KOPKO, RANDY J. ICKERT)	
and KATIE L. AVENALI,)	
)	
Defendants)	JURY TRIAL DEMANDED

MOTION TO DISMISS AND STRIKE

Defendants Larry E. Kopko, Randy J. Ickert and Katie L. Avenali respectfully submit the following Motion to Dismiss and Strike pursuant to Fed.R.Civ.P. 12(b)(6) and 12(f).

1. On June 24, 2004 plaintiff Josh L. Anderson filed an amended complaint entitled "Complaint" in which he asserted claims against defendants Larry E. Kopko, Randy J. Ickert and Katie L. Avenali pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution.

2. Plaintiff requested relief in the nature of (1) a declaration from the Court that his United States Constitutional and statutory rights were violated, (2) preliminary and permanent injunctions prohibiting defendants from "harassing and assaulting" plaintiff, (3) compensatory damages of \$250,000 against each defendant and (4) punitive damages of \$200,000 against each defendant.

3. Plaintiff's amended complaint asserts that on February 4, 2004, while two corrections officers held him down, defendant Avenali "[kicked him] in the face then jumped down and punched [him] and started to beat [his] head off the floor." Plaintiff asserts that defendant Ickert refused "a large number of requests" from plaintiff "to have [defendant] Avenali work somewhere else"; on March 4, 2004, he "presented the facts relating to this complaint," and

on March 8, 2004 he sent a letter to defendant Kopko stating that he "wished to file criminal charges [against defendant] Avenali for assault," all in an effort to "use...the prisoner grievance procedure...to try to solve the problem."

4. Plaintiff's action against defendants Kopko and Ickert should be dismissed and his claims of entitlement to certain dollar amounts of compensatory and punitive damages and his prayers for injunctive and declaratory relief should be stricken from plaintiff's amended complaint, for the following reasons:

- a. Plaintiff's action against defendants Kopko and Ickert should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) because his amended complaint does not allege their personal involvement in the excessive force allegedly used on plaintiff by defendant Avenali.
- b. Plaintiff's claims of entitlement to certain dollar amounts of compensatory and punitive damages are in violation of W.D. PA. LR 8.1 and, therefore, should be stricken from plaintiff's amended complaint pursuant to Fed.R.Civ.P. 12(f).
- c. Plaintiff's prayers for injunctive and declaratory relief should be stricken from plaintiff's amended complaint pursuant to Fed.R.Civ.P. 12(f) because those remedies are unavailable in the absence of a reasonable likelihood of recurrence of unlawful conduct by defendants.

WHEREFORE, defendants Larry E. Kopko, Randy J. Ickert and Katie L. Avenali respectfully request that the Court issue an order dismissing plaintiff's action as it relates to Larry E. Kopko and Randy J. Ickert, and striking from plaintiff's amended complaint his prayers for monetary damages in sums certain and for injunctive and declaratory relief.

Respectfully submitted,

/s/ James T. Marnen

James T. Marnen

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